

No. 1-18-1303

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ESTATE AND TRUST SERVICES GROUP, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 CH 32739
)	
WINDY CITY FINANCIAL PARTNERS, INC.,)	Honorable
)	Patrick J. Sherlock,
Defendant-Appellant.)	Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the orders of the circuit court denying the defendant's motions for judgment notwithstanding the verdict or a new trial where: (1) the plaintiff presented evidence sufficient to establish an oral contract with the defendant that the defendant subsequently breached; and (2) the defendant forfeited its argument that it was entitled to a new trial.

¶ 2 The defendant, Windy City Financial Partners, Inc. (Windy City), appeals from an order of the circuit court of Cook County denying its motion for judgment notwithstanding the verdict

(judgment *n.o.v.*) in favor of the plaintiff, Estate and Trust Services Group, LLC (ETSG). Windy City also appeals from the denial of the alternative relief it sought in the form of a new trial. For the reasons that follow, we affirm.

¶ 3 The following facts relevant to our disposition of this appeal were adduced from the pleadings and the evidence introduced at trial.

¶ 4 On August 28, 2012, ETSG filed a declaratory judgment action against Windy City in the circuit court of Cook County. ETSG raised claims for breach of contract (count I), unjust enrichment (count II), conversion (count III), and injunctive relief (count IV), alleging that Windy City failed to pay renewal commissions and bonuses to ETSG on life insurance policies that ETSG sold pursuant to an oral contract with Windy City. Windy City elected a jury trial on counts I and III.

¶ 5 Prior to trial, Windy City filed several motions *in limine* seeking, *inter alia*, to bar introduction of a spreadsheet and memorandum ETSG created prior to entering into business with Windy City that purported to depict the terms offered by several potential business partners, including Windy City. Windy City maintained that the documents were not relevant to the final terms of the agreement and, under Illinois Rule of Evidence 403 (eff. Jan. 1, 2011), were more prejudicial than probative. The circuit court denied the motion and the matter proceeded to trial.

¶ 6 Kurt Dombro, the sole officer of ETSG, testified that prior to forming ETSG, he was employed at Wells Fargo where he sold life insurance policies to the company's financial advisors. In 2007, Dombro suspected that Wells Fargo would outsource his department and he began investigating the possibility of selling insurance as an independent entity. As part of this

process, Dombro contacted similarly situated colleagues at Wells Fargo, such as James Farmer and Norm Sehnoutka, about forming a business together.

¶ 7 Dombro learned that, in order to sell life insurance policies independent of Wells Fargo, he needed to partner with a brokerage general agency (BGA) that held contracts with major life insurance carriers. This would allow Dombro to sell the policies of the carriers who contracted with the BGA. Dombro contacted several such entities to determine what terms they offered and recorded their responses in a spreadsheet (Plaintiff's Exhibit 4), which was introduced into evidence over Windy City's hearsay and foundation objections. Dombro testified that the spreadsheet reflects communications he had directly with several BGAs, with the exception of Windy City. He explained that the information regarding Windy City was relayed to him from Farmer and Sehnoutka, who initiated the discussions with Windy City due to their prior relationship with Robert Lyman, Windy City's vice-president.

¶ 8 According to Dombro, the spreadsheet indicates each BGA's compensation plan, which is based on the first year premiums paid by policy holders, and whether the BGA offered vested renewals. Dombro testified that one of his main priorities in selecting which BGA to partner with was whether it offered "vested" renewals. Dombro stated that "renewals" referred to the commissions that were paid when the policy holders renewed their life insurance policies each year (generally only for years 2 through 10) and that "vested" renewals meant that he would "own" the annual renewal commissions on policies he sold "forever." He explained that the spreadsheet reflects the fact that several BGAs, including Windy City, offered vested renewals for policies sold either directly to policy holders or through a financial advisor. The spreadsheet also reflects that Windy City is a member of Advantage Insurance Network (AIN), which

Dombro explained is a “commission club” that pays bonuses for reaching a certain volume of target premiums. After Dombro completed the spreadsheet, he sent it to several of his colleagues at Wells Fargo, including Farmer and Sehnoutka.

¶ 9 Eventually, Dombro, Farmer, Sehnoutka, and four other former colleagues agreed to go into business together, each forming their own limited liability company (LLC). It was at this time that Dombro formed ETSG. On April 15, 2008, the seven of them, through their individual LLCs, formed Financial Strategies Group, LLP (FSG). Dombro testified that FSG was a “shell organization” that operated as a “brand” or a “label” for the underlying LLCs.

¶ 10 Thereafter, Dombro and the other FSG partners met with Lyman and Erik Ekstrom, Windy City’s president, to discuss the terms of their potential business relationship. According to Dombro, the terms established that ETSG and the other partners of FSG would broker insurance policies for the carriers under contract with Windy City and Windy City would provide full processing services and support for these policies in exchange for 7.5% of the first year commissions. Windy City would then pay the remaining balance of the first year commissions, renewal commissions, and any AIN bonuses earned directly to each FSG partner. The renewal commissions and AIN bonuses were fully vested. Dombro further testified that, as part of the negotiation, Windy City agreed to pay the salary of Christina Fontenette, an administrator who followed Dombro from Wells Fargo and worked out of ETSG’s offices. Subsequently, in May of 2008, the partners of FSG agreed to do business with Windy City.

¶ 11 According to Dombro, one FSG partner, Doug Flaute, stopped doing business with Windy City two weeks into the deal and partnered with a different BGA. That aside, Dombro testified that ETSG and Windy City operated under the original terms of the agreement for

nearly 18 months. ETSG introduced into evidence copies of commission statements Windy City sent to Dombro, along with copies of the corresponding checks showing payment of the commissions. The commission statements reflect the terms of the agreement that Dombro testified to, namely: Windy City collected 7.5% of the first year commissions and paid the remainder directly to ETSG along with renewal commissions and AIN bonuses. Copies of pay stubs show that Windy City paid ETSG directly. Dombro testified that the original agreement was modified after six months when Windy City informed him that they could no longer afford to pay Fontenette's salary. From that point onward, Windy City deducted Fontenette's salary from the income ETSG generated. The other terms of the agreement remained the same.

¶ 12 As the relationship progressed, issues arose regarding the timeliness of renewal payments. ETSG introduced several emails between Dombro and Windy City personnel discussing this issue. On August 31, 2009, Dombro sent Lyman a memorandum detailing, from Dombro's perspective, the contents of an August 28, 2009 conference call between the two men. Dombro testified that he initiated the discussion partly in response to Windy City's failure to pay certain renewal commissions owed under the agreement. One of the bullet points in the memorandum asks how the renewals are being "coded" and if they are vested. The memorandum indicates that Lyman answered in the affirmative and told Dombro that Windy City was working to "re-code" the renewal commissions so that the insurance carrier would pay the commissions directly to the FSG partner rather than the payment going through Windy City. For those renewal commissions that could not be re-coded, the memorandum states that Windy City would pay those commissions to the appropriate FSG partner. Dombro explained that to "re-code" the renewal commissions meant that Windy City would execute an "agency change" form with the

insurance carrier indicating that those particular commissions should be paid directly to ETSG rather than to Windy City. Dombro further explained that once the renewals were re-coded to him, those renewals were vested.

¶ 13 ETSG also introduced an October 29, 2009 email exchange with Ekstrom that Dombro testified was a follow-up conversation regarding the renewal commissions and Windy City's efforts to code the renewals to ETSG. In the emails, Dombro sends Ekstrom a list of all of the renewals due on his policies. Dombro also asks if two insurance carriers (Lincoln National Life and ING) have been "coded over" and what the strategy is for the others, especially John Hancock. Ekstrom responds that Dombro "should be receiving all of [his] renewals directly from the carriers," but Ekstrom did not know whether that was true of John Hancock. Ekstrom also wrote that the list Dombro created will aid Windy City in tracking if any ETSG renewals are sent to it instead of ETSG. Dombro further testified that Windy City successfully "coded" all of the renewals from Lincoln and some from ING.

¶ 14 On December 8, 2009, Dombro, along with other FSG partners, met with Windy City to discuss issues that had developed during the course of the relationship. According to an email summary Ekstrom sent the following day, FSG expressed a concern that renewal commissions were not being paid in a timely fashion and Windy City agreed to "be pro-active in following up with the carriers to make sure commissions will be paid correctly on those cases." The email also indicates that Windy City would "discuss ways to secure FSG's renewals, commission split and carrier contract access."

¶ 15 At the beginning of 2010, Windy City approached ETSG and the other FSG partners about altering the terms of their agreement. In a February 18, 2010 email, Lyman provided a

“first draft” of a written proposal for the new terms. According to the proposal, the new terms would be effective March 1, 2010. Under the new agreement, Windy City received 10% of the first year target premium, 5% of which covered its expenses, and FSG would “continue to receive all renewals and bonuses.” Dombro replied asking for more details and a clarification that the new terms apply prospectively. Dombro and another FSG partner drafted a memorandum of understanding consistent with the new terms that Windy City offered while reiterating the remaining original terms, including vested renewal commissions and bonuses for all past and future policies. The final draft was dated March 7, 2010. Dombro testified that he “believed” that the memorandum of understanding that he drafted was sent to Windy City. In a later document from Lyman responding to some questions from Dombro, Lyman proposed in the new agreement that Windy City split the renewal commissions 50/50 with FSG partners. The document also details the current agreement, from Lyman’s perspective, which reflects that FSG partners received all of the renewal commissions for years 2 through 10.

¶ 16 Beginning in March of 2010, Windy City sent Dombro commission statements that reflected the terms of the new deal, to which Dombro had not yet agreed. Dombro became concerned and sought to find a new BGA with which to partner.

¶ 17 Ultimately, Dombro determined that he did not want to continue working with Windy City. On May 27, 2010, Dombro sent Lyman a letter terminating the relationship effective June 30, 2010. Dombro attached a copy of the March 7, 2010 draft agreement, a “current case underwriting list,” and a “case renewal” report. Dombro’s letter further states that “all prior agreements verbal and draft, confirm vesting for each FSG partner of” all renewals and bonuses.

Lyman did not respond to Dombro's letter, nor did anyone else at Windy City. Dombro followed up with an email the next day to Lyman and Ekstrom that also went unanswered.

¶ 18 Dombro testified that he submitted his last new policy with Windy City on May 25, 2010, but he continued to receive commission renewals and AIN bonuses from Windy City for certain policies through October 14, 2011, while others went unpaid. In an email sent on January 4, 2011, Dombro provided Mary Imke, an employee of Windy City, with a renewal report indicating which renewal commissions had not been paid. He also asked her why agent renewals for John Hancock policies had been cut in half. Dombro testified that this particular issue was resolved to his satisfaction and Windy City paid the difference.

¶ 19 According to Dombro, on October 31, 2011, he emailed Lyman, Ekstrom, and Imke, attaching a spreadsheet showing the renewals that had been paid and those still outstanding. Dombro did not receive a response. Dombro sent follow up emails to Ekstrom on December 8th and 13th. Dombro attached to the December 13th email the "agency change" form for John Hancock, which was required to have the renewal commissions coded to ETSG as Windy City did with other insurance carriers. Dombro again received no response.

¶ 20 Dombro next sent a letter to the owners of Windy City on January 17, 2012, explaining that he agreed to partner with Windy City specifically because they offered to "immediately vest" all renewals and requesting that they intervene to honor the initial agreement. Another letter was sent on January 23, 2012, to Lyman expressing the same sentiment. Dombro did not receive a response.

¶ 21 On cross-examination, Dombro acknowledged that, during his deposition, he was asked if the only parties to the agreement were FSG and Windy City and he responded "I guess so."

¶ 22 On redirect-examination, Dombro acknowledged giving the following testimony during his deposition: “[T]echnically FSG didn’t really have a relationship with Windy City. FSG is a pass-through entity *** The agreements are all with the various LLCs that are associated with FSG, which is a limited liability partnership.”

¶ 23 Windy City presented James Farmer, an FSG partner, to testify for the defense. Farmer largely corroborated Dombro’s testimony regarding the terms of the oral agreement with Windy City, including that Windy City would keep 7.5% of the first-year commissions and that Windy City would pay to FSG partners 100% of the renewal commissions and bonuses earned on policies sold by FSG partners. He denied, however, that Windy City agreed to “vested” renewals or the continued payment of renewals in the event that an FSG partner ceased its relationship with Windy City. According to Farmer, the parties never discussed what would happen if a partner stopped doing business with Windy City.

¶ 24 Farmer acknowledged that he received Dombro’s spreadsheet indicating that Windy City’s offer included vested renewals, but he testified that “a lot of things” on the sheet were incorrect. Farmer, however, could not recall if he ever raised concerns about the accuracy of the information to Dombro.

¶ 25 Farmer also corroborated Dombro’s testimony that FSG was a “shell” LLP. Farmer explained that no money was paid to FSG but rather the partner LLCs were paid directly by Windy City. He acknowledged that he described FSG in his deposition as “more of a branding.” He also confirmed that FSG did not have any assets.

¶ 26 ETSG presented Robert Lyman, president of Windy City, as a rebuttal witness. Lyman testified that Windy City entered into a relationship with FSG and not FSG’s individual partners.

When presented with a copy of Windy City's answer in this litigation, Lyman acknowledged that Windy City admitted that "it entered into an agreement with ETSG and other partners of FSG in the Spring of 2008 for 2008."

¶ 27 Lyman acknowledged that two pieces of Windy City promotional material, a brochure from 2008 and a page titled "Partnership Benefits" on Windy City's website, state that Windy City offers "100% vesting" as an incentive. Lyman maintained that these materials were aimed at "attracting agents." On cross-examination, Lyman explained that there are two sets of renewal commissions. According to Lyman, the first renewal commission goes to the agents who "wrote the policies" and, as referenced in the brochure and on the website, Windy City vests this commission with the individual agent. The second renewal commission goes to the BGA, such as Windy City. Lyman explained that it is these renewal commissions to which ETSG argues they are entitled.

¶ 28 The jury returned a verdict in favor of ETSG on its breach of contract (count I) and conversion (count III) claims. The jury awarded the plaintiff \$261,118.93 in damages for count I and \$0 in damages for count III. Thereafter, the plaintiff moved for entry of judgment on counts II (unjust enrichment) and IV (injunctive relief). On February 20, 2018, the circuit court entered an order (1) denying ETSG relief under count II because the issue was moot and (2) granting ETSG an injunction requiring Windy City to pay renewal commissions and execute change of agent forms with the various insurance carriers so that all future renewal commissions are paid directly to ETSG.

¶ 29 Windy City filed a post-trial motion, seeking entry of a judgment *n.o.v.* or, in the alternative, a new trial. In support of its prayer for the entry of a judgment *n.o.v.*, Windy City

argued that the circuit court erred in denying its request for a finding that ETSG, through Dombro, admitted that the agreement was between FSG and Windy City, not ETSG and Windy City. In support of its alternative request for a new trial, Windy City argued that the circuit court erred by admitting Dombro's spreadsheet into evidence and allowing Dombro to testify regarding the Lincoln National agency change form. The circuit court denied Windy City's post-trial motion, and this appeal followed.

¶ 30 As a preliminary matter, we note that the appellant's brief does not conform to the Illinois Supreme Court Rules. Specifically, the appellant's fact section is fraught with argument in violation of Illinois Supreme Court Rule 341(h)(6) (eff. May 25, 2018). Accordingly, any facts that are argumentative will be disregarded.

¶ 31 Windy City's first argument on appeal is that the circuit court erred in denying its motion for judgment *n.o.v.* on the plaintiff's breach of contract claim.

¶ 32 "A motion for judgment *n.o.v.* should be granted only when 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [a] movant that no contrary verdict based on that evidence could ever stand.' " *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37 (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). "[A] motion for judgment *n.o.v.* presents a 'question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the [plaintiff's] case.' " *Id.* (quoting *Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300, 311 (1942)). Judgment *n.o.v.* is not appropriate if "reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented." *Pasquale v. Speed Products*

Engineering, 166 Ill. 2d 337, 351 (1995). The denial of a motion for judgment *n.o.v.* turns on a question of law, and our standard of review is *de novo*. *Taylor v. Board of Education of City of Chicago*, 2014 IL App (1st) 123744, ¶ 33.

¶ 33 Windy City argues that ETSG failed to establish that it breached an oral contract with ETSG because the evidence showed that Windy City entered into an agreement with FSG, not ETSG. Alternatively, Windy City contends that the terms of the agreement were insufficiently defined with regard to the payment of renewal commissions after the relationship ended. We disagree.

¶ 34 To prevail on a breach of contract action, a plaintiff must establish the following: (1) the existence of a valid and enforceable contract, (2) performance by the plaintiff, (3) breach of the contract by the defendant, and (4) damages or injury to the plaintiff as a result of the breach. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 27.

¶ 35 Oral contracts are enforceable. An oral agreement is binding where there is an offer, an acceptance, and a meeting of the minds as to the terms of the agreement. *K4 Enterprises, Inc. v. Grater, Inc.*, 394 Ill. App. 3d 307, 313 (2009). For a contract to be enforceable, the material terms of the contract must be definite and certain. *K4 Enterprises*, 394 Ill. App. 3d at 313. “[A] contract ‘is sufficiently definite and certain to be enforceable if the court is enabled from the terms and provisions thereof, under proper rules of construction and applicable principles of equity, to ascertain what the parties have agreed to do.’” *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 314 (1987) (quoting *Morey v. Hoffman*, 12 Ill. 2d 125, 131 (1957)). “It suffices that the conduct of the contracting parties indicates an agreement to the terms of the alleged contract.” *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 331 (1977)

“Otherwise, a party would be free to avoid his contractual liabilities by simply denying that which his course of conduct indicates.” *Midland Hotel Corp.*, 118 Ill. 2d at 314.

¶ 36 Turning first to whether ETSG was a party to the agreement, we find that there was sufficient evidence to support the jury’s finding that it was. ETSG presented evidence, corroborated by Farmer, that FSG was a “shell” entity for “branding” purposes only and that no money was ever paid to FSG. Indeed, the terms of the agreement were negotiated by Dombro, ETSG’s sole officer, and the other FSG partners when they met with Lyman, Ekstrom, and the ownership of Windy City. Likewise, Windy City behaved as though its agreement was with the individual partners of FSG rather than FSG itself. Windy City sent commission statements directly to Dombro, paid all commissions directly to ETSG, and worked with Dombro to get renewal commissions coded directly to ETSG. There is no evidence of anything being sent or paid to FSG. Additionally, in its answer to the complaint, Windy City admitted that “it entered into an agreement with ETSG and other partners of FSG in the Spring of 2008 for 2008.” Lastly, ETSG presented evidence that certain terms of the agreement were unique to it, such as Windy City agreeing to pay the salary of Fontenette, who was an administrator for ETSG, which it did for six months until ETSG agreed to have her salary deducted from its compensation. In short, the evidence established that Windy City knew that it was dealing with ETSG, not FSG.

¶ 37 Windy City nevertheless argues that Dombro “admitted” that the agreement was between Windy City and FSG, which deprives ETSG of standing to pursue this claim, relying almost entirely on Dombro testifying that he was being truthful in his deposition testimony when he replied “I guess so” when asked whether the agreement was between FSG and Windy City. However, Windy City ignores the portion of Dombro’s deposition testimony that explains,

consistent with his trial testimony, that the agreement was among Windy City and “the various LLCs that are associated with FSG.” Windy City also incorrectly contends that Dombro admitted, during his testimony, that he did not have contact with Windy City before entering into the contract. In the portion of testimony that Windy City cites, Dombro admits only that he did not have contact with Windy City prior to completing his spreadsheet and that the information regarding Windy City came from Farmer and Sehnoutka. This again ignores the fact that Dombro testified, and Windy City admitted in its answer, that Dombro met with Windy City executives prior to entering into the agreement.

¶ 38 At minimum, the parties presented conflicting evidence regarding which parties were subject to the agreement. However, in determining the propriety of a motion for judgment *n.o.v.*, it is not our place to reweigh this evidence or determine the credibility of the witnesses. As such, and because the evidence does not so overwhelmingly favor Windy City such that no contrary verdict based on that evidence could ever stand, we reject Windy City’s contention that its motion for judgment *n.o.v.* was improperly denied.

¶ 39 Windy City also argues that the terms of the agreement were insufficiently definite with respect to whether an FSG partner was entitled to renewal commissions after that partner ceased working with Windy City and, therefore, the oral agreement is unenforceable.

¶ 40 However, Windy City did not raise this argument in its motion for judgment *n.o.v.* and, as a result, the argument is forfeited. *Burgdorff v. International Business Machines Corp.*, 74 Ill. App. 3d 158, 162 (1979) (“An argument not raised in a post-trial motion is waived and cannot be considered on appeal.”).

¶ 41 In sum, after viewing all of the evidence in the light most favorable to ETSG, we conclude it does not so overwhelmingly favor Windy City such that no contrary verdict could stand.

¶ 42 In support of its argument that the circuit court erred in denying its alternative prayer for relief seeking a new trial, Windy City contends that the verdict in favor of ETSG is against the manifest weight of the evidence and the circuit court denied it a fair trial by improperly admitting Dombro's spreadsheet into evidence. We take each argument in turn.

¶ 43 “[O]n a motion for a new trial, the trial court will weigh the evidence and order a new trial if the verdict is contrary to the manifest weight of the evidence.” *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992). “A verdict is against the manifest weight of the evidence only where the opposite result is clearly evident or where the jury’s findings are unreasonable, arbitrary and not based upon any of the evidence.” *Lawlor*, 2012 IL 112530, ¶ 38.

¶ 44 Windy City did not argue in its motion for a new trial that the verdict was against the manifest weight of the evidence. Illinois Supreme Court Rule 366(b)(2)(iii) (eff. Feb. 1, 1994) provides that “[a] party may not urge as error on review of the ruling on the party’s post-trial motion any point, ground, or relief not specified in the motion.” As a result, Windy City has forfeited this argument on appeal.

¶ 45 Windy City also contends that the circuit court erred by admitting into evidence Dombro's spreadsheet outlining the terms offered by various BGAs.

¶ 46 Evidentiary challenges raised in a motion for new trial are subject to an abuse of discretion standard of review. See, e.g., *Adams v. Sarah Bush Lincoln Health Center*, 369 Ill. App. 3d 988, 998 (2007) (“When a party challenges a trial court’s evidentiary ruling, the

standard of review is abuse of discretion”). An abuse of discretion occurs when the court’s ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the court. *Aguilar–Santos v. Briner*, 2017 IL App (1st) 153593, ¶ 61.

¶ 47 Illinois case law is clear that when a motion *in limine* is denied, “[an] objection must be made when the evidence is offered at trial or the right to raise this issue on appeal is waived.” *Chubb/Home Insurance Cos. v. Outboard Marine Corp.*, 238 Ill. App. 3d 558, 567 (1992). Because orders *in limine* are interlocutory in nature and thus subject to reconsideration throughout the trial, proper and timely objections allow the trial court to interpret and make any necessary corrections to its prior order during trial, and also allow a reviewing court to benefit from the trial court’s interpretation of its order. *Id.* at 567–68.

¶ 48 Here, Windy City’s counsel did not raise either a relevance or Rule 403 objection at trial. As a result, they have forfeited review of this issue.

¶ 49 For the foregoing reasons, we affirm the judgment of the circuit court in favor of the plaintiff.

¶ 50 Affirmed.